# INTRODUCTION

## I. Linguistic issues and multilingual texts

In the 19th century – when tax treaties did not exist – international agreements were generally concluded in one language only. For instance, a review of the 46 (obviously non-tax) international agreements signed by the Kingdom of Italy during the period 1861–1865 shows that most of the treaties (32) were concluded in the French language and that only a minority (14) were concluded in the Italian language (or in Italian and a second language, which was sometimes alien to the other contracting State).[1] The practice of concluding international agreements in two or more authentic languages became frequent in the early part of the 20th century and this development influenced the drafting of tax treaties, which States commenced systematically to conclude as from the second decade of the century.[2] Since then, tax treaties have usually been drafted in the (authentic) languages of the contracting States.[3]

In the absence of two or more (authentic) languages, jurists may nevertheless face linguistic issues; under internal law these primarily arise in private international law and comparative law, and generally feature in laws expressed in *(only) one language* that is alien to the State in which their application is sought. In the (tax) treaty context, linguistic issues primarily arise when there is (*only) one authentic language*, which is alien to one or both contracting States. Even if this practice is not common, in recent years, a few States began to conclude tax treaties in only one language. For example, Belgium, Israel and Norway concluded several tax treaties only in English, and most of the time such language is the authentic language of none of the contracting States.[4]

Exceptionally, linguistic issues may also arise when the authentic language belongs to both contracting States. A good example is represented by the translation prepared by the German tax authorities of the OECD Model Convention[5] and Commentaries. In this respect, the Austrian Ministry of Finance indicated its disagreement to 26 terms and expressions contained in the translation and stated its intention to use different expressions in the "Austrian- German" authentic versions of bilateral treaties reflecting the OECD MC. The courts of several States have focused on linguistic issues in the presence of only one language. Examples may be found in the Canadian case of *Gladden Estate*,[6] in which the Federal Court of Canada compared the expression "sale or exchange" used in the capital gains article of the former Canada-US treaty with the term "disposition" as used under internal law (the issue was whether a deemed disposition on death was covered by the "sale or exchange" exemption under the treaty), and in the Australian decision of *McDermott Industries (Aust) Pty Ltd v. Commissioner of Taxation*,[7] in which the Federal Court of Australia interpreted the meaning of the term "use" as laid down in the Australia-Singapore tax treaty.[8]

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[1] See *Raccolta dei Trattati e delle Convenzioni Conchiuse fra il Regno d'Italia ed i Governi Esteri*, Turin: Paravia, 1865.

[2] Compare Italy-Germany (1925), Italy-Czechoslovakia (1924), Italy-Hungary (1925), Danzig-Poland (1929), Italy-Spain (1927), France-Germany (1934) and Germany-Sweden (1928).

[3] See M. Chretien, "*L'interprétation des traités bilatéraux sur la double imposition: methods et procedures*" in *Droit fiscal* 1960, at 13, who also refers to the French practice until such period.

[4] Such practice is also known in Italy. For example, the Italy-Greece treaty for the avoidance of inheritance and gift taxes (1964) was approved and published in the Italian *Official Gazette* only in French. See Chapter 12, at 12.3.2.

[5] Hereinafter "OECD MC".

[6] Federal Court of Canada, 25 March 1985.

[7] Federal Court of Australia, *McDermott Industries (Aust) Pty Ltd v. Commissioner of Taxation*, (2004), FCA 10044. In order to properly interpret the term "use", the court considered a renowned English dictionary and concluded that the explanations of that term according to the dictionary did not resolve the issue. For this reason, the court reverted to an interpretation based on the object and purpose of the treaty.

[8] The official languages in Singapore are Mandarin (Chinese), Malay, Tamil and English. Malay is the national language and English is the language of the public administration. According to Art. 53 of the Constitution of Singapore, until the legislature otherwise provides, all parliamentary debates and discussions shall be conducted in Malay, English, Mandarin, or Tamil.

Evidently, these are (linguistic) issues that arise when a (treaty) term is compared to the same or similar term under the internal law of one or both of the contracting States. These are linguistic issues because the meaning of a term is explored in more than one legal system or under several legislative contexts (treaty and domestic) that do not belong exclusively to the same State. This is certainly different from linguistic issues that arise when the ordinary meaning under the treaty in one language is sought without referring to any of the internal laws of the contracting States. For instance, the interpretation of the term "substantial equipment" used in the former Australia-US treaty and debated before an Australian court[9] could have arisen equally in the construction of any such term under the internal law of any State, since the court explored the meaning of the expression having regard solely to the ordinary meaning without reference to the internal law of the contracting States.

In some States, however, linguistic issues go beyond the translation of terms expressed in one exclusive, authentic language and become issues arising from multilingual texts**.** These are different from linguistic issues that are distinguished by only one authentic language. Indeed, States that have more than one authentic language have paid special attention to the (multi)linguistic issues in the interpretation of their internal laws – including tax laws – and this has resulted in the development of special statutory rules, doctrines or drafting rules[10] (e.g. the presumption of the same meaning in bilingual texts or the prevalence of the meaning which best reconciles the texts).[11]

Under tax treaties, multilingual issues primarily arise in the presence of *two or more* equally authoritative *authentic languages*. Multilingual issues are different from issues of translation, which imply the predominance of one (authentic) language on other (non-authentic) languages. In practice, however, translation issues also exist in the presence of languages that have equal authority, as there is always a working or drafting language.

Translation first comes into play under tax treaties when one language constitutes – as generally happens – the basis for the negotiation of a bilateral treaty so that the approved version is subsequently translated into the other(s) authentic versions(s).[12] Is this circumstance (i.e. influence of negotiating language) relevant for interpretation purposes?

International courts and tribunals tend to exclude the predominance of the working or negotiating language since the creation of a legal presumption in favour of that language would frustrate the principle of equality of texts.[13] This view is supported by the history of the preparation of the Vienna Convention on the Law of Treaties, which indicates that it was suggested to give special weight to the language in which the text was drawn up in situations where it was impossible to

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[9] Case No. H 106 (1957) 8 TBRD 484 of the Board of Review of Sydney issued on 18 December 1957. The case related to an American company that appointed an English company to be its sole distributor in Australia and New Zealand. The English company was granted a licence to manufacture the product for sale in those countries and to sell and distribute the product in those territories. For that purpose, the English company was granted the full and exclusive licence to use in Australia and New Zealand certain trademarks, trade names and licences relating to the product. The American company agreed to lend the English company certain machinery, apparatus or equipment that the English company deemed necessary for the manufacture of the product. The Australian court analysed whether the American company had "substantial equipment" in the Australian territory in order to determine whether the company was carrying on a business in Australia through a permanent establishment.

[10] See, for example, the criteria developed by the Law Drafting Division of the Department of Justice of Hong Kong (available at www.doj.gov.hk) with respect to legislation to be drafted in the English and Chinese languages.

[11] A good example of this kind of interpretative rules is found in the Interpretation and General Clauses Ordinance of the Laws of Hong Kong, as amended by the Interpretation and General Clauses, which provides that in the event a comparison of the authentic texts of a provision drafted in the English and in Chinese languages discloses a difference of meaning which the rules of statutory interpretation ordinarily applicable do not resolve, the meaning that best reconciles the texts, having regard to the object and purposes of the particular provision, is to be adopted.

[12] It is fair to say that in recent years English is the language that is normally used during negotiation and seems to be also followed within the Fiscal Committee of the OECD (See Chapter 7, at 7.1.). On the problems raised by the use of only one language during negotiations see R. Cohen, "Meaning, Interpretation and International Negotiation", *Global Society*, Vol. 14, No. 3, 2000, who, with reference to non-tax treaties, points out that the "…failure to assign sufficient weight to linguistic and semantic peculiarities risks concealing from unsuspecting negotiators an entire dimension of potential dissonance", which might create problems in interpreting international agreements.

[13] See Chapter 5, at 5.2.

reconcile the official texts. The proposal was rejected.[14] Some tax courts have departed from the principle Gof irrelevance of the working language or negotiating text. The Swedish Supreme Court, for instance, relied on the English text of the Sweden-UK tax treaty to grant a capital gains exemption because the 1960 Protocol to the treaty had been negotiated in English.[15] Despite the strong criticism to this conclusion, it was pointed out that the concept of equality of States is not altered by the recognition that a treaty in one language may be a true reflection of both States' intention, compared to an (equally authoritative) version which came into existence only upon translation of the text initialled in the negotiating/working language.[16]

A number of States have translated the OECD Model Convention into their own language and use it – as the case may be – to prepare the authentic versions of their tax treaties. One or both authentic languages of the OECD Model Convention and Commentaries often influence translation. There is no doubt, for example, that the French version has influenced the terms and expressions used in the Italian-language authentic version of bilateral conventions concluded by Italy. This is true for terms such as "capital gains" or "accrued" or "body of persons".

The influence on translations exercised by a version of the OECD Model Convention holds true even if the bilateral treaty is negotiated in a third language. For instance, if Italy and the United Kingdom negotiate a treaty in the English language and agree to adopt verbatim Art. 13 of the OECD Model, the Italian authentic version of the treaty would be influenced by the French language because Italy would use its own Italian translation of the OECD Model, which – at least for provisions that have been included until the 1977 version of the Model – is influenced by the French language.

There is, therefore, perhaps an additional reason to significantly limit the relevance of the working language for the purposes of interpretation of tax treaties: compared to (most) other treaties, they are based on an OECD Model Convention drafted in two authentic versions that other States have translated in their own language for the purposes of drafting authentic versions of their bilateral treaties; therefore, the wording of a bilateral treaty may be influenced by the negotiating language but also by either the French or English version of the OECD Model Convention. This mixed influence makes the effect of the negotiating language less certain and even less significant for the purposes of interpretation of the treaty.

The country survey reports (Chapters 8–14) indicate that the judiciary has paid scant attention to multilingual issues arising in the application of tax treaties. The only court that seems to consider on a recurrent basis the other foreign authentic language of tax treaties is the Federal Court of Australia,[17] which has sometimes also sought the advice of foreign counsels to obtain clarifications on the exact meaning of foreign terms and expressions.[18]

## II. Translation of legal concepts

There are situations, however, in which translation legitimately plays a role in the presence of multilingual texts that have equal authority. This is the case when the term in one language has a legal meaning that does not exist in the legal system to which the other language belongs, so that

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[14] A. Verdross made the proposal at the 874th meeting of the International Law Commission. See P. Germer, "Interpretation of plurilingual treaties: a study of Article 33 of the Vienna Convention on the law of treaties" in *Harvard International Law Journal*, Vol.11, at 400.

[15] For a critical commentary of the case see P. Sundgren, "Interpretation of Tax Treaties – A Case Study" in *British Tax Review*, 1990, at 300.

[16] M. Edwardes-Ker, *Tax Treaty Interpretation*, Dublin: In-Depth Publishing, 1995, chapter 20, at 8.

[17] See, Federal Court of Australia, *Thiel v. Commissioner of Taxation* [1990] 171 CLR 338 FC 90/034, in particular at Para. 9; Federal Court of Australia, *Chong v. Commissioner of Taxation* [2000] FCA 635; Federal Court of Australia; *McDermott Industries (Aust) Pty Ltd v. Commissioner of Taxation* [2004] FCA 10044.

[18] In particular, in *Lamesa Holdings BV v. Commissioner of Taxation* ([1997]1 34 FCA) the Federal Court of Australia took inspiration from the principle set forth in the *Thiel* case (supra, note 16) and affirmed that in interpreting a tax treaty it is permissible to "…consider the corresponding version of the Agreement in the language of the country with whom Australia had concluded the Agreement". In order to properly understand the meaning of the term, the Court reverted to a report of a Dutch counsel.

a "translation" of the term amounts to the *translation of a legal concept*. In such a case, the translator must make available a concept that is alien to his own system. A good example of the issue of the translation of legal concepts is shown by the use of the terms "copyright" and "*droit d'auteur*"[19] that seems to have also influenced the drafting of the current tax treaty concluded by France and the United States. In fact, in departing from the wording of Art. 12 OECD MC, this treaty refers to "payments of any kind received as a consideration for the use of, or the right to use, any copyright of a literary, artistic, or scientific work, including payments for the use of, or the right to use any … *neighboring right*" [emphasis added] (in the French version, "*droit voisin*"). The Technical Explanations to the France-US tax treaty clarifies that the "… references to neighboring rights and to software simply confirm that both States share the same interpretation of the term "copyright". They are not intended to suggest that the term "copyright", as used in other U.S. treaties (including the present treaty with France), excludes software or neighboring or similar rights." This clarification is evidently meant to avoid speculations as to the exact meaning of the concept of "copyright" and that of "*droit d'auteur*".

Under internal tax law it is not uncommon to apply provisions to a foreign legal concept (i.e. a concept that is known only in another legal system or which is common to both systems, but is – in the specific case – governed by the legal system of only one State). The techniques used under internal tax law might equally be used to provide a solution under tax treaties.

A first technique used under internal tax law (i.e. reference to a statutory provision) is to make reference to the tax or private law statutory provision that defines or covers the term or expression. In the United States, for example, certain tax reliefs are made available to corporate reorganizations within the meaning of Sec. 368(a)(1)(D).[20] By virtue of the reference to a statutory internal law provision the concept is thus clear but it excludes similar or nearly equivalent foreign situations to benefit from the same rule. This somewhat parochial approach may be contrary to non-discrimination provisions contained in tax treaties[21] and may equally constitute violations of the EU fundamental freedoms laid down by the EC Treaty.

There may be (reverse) situations, however, in which internal law could make reference to a foreign expression (e.g. "trust"); here, *express reference to a foreign legal concept* governs and discrimination should not be at stake because the use of the foreign expression is meant to broaden the scope of application of a (tax) rule.[22] There is, nevertheless, a fair degree of ambiguity in this technique insofar as a foreign legal concept may have different legal meanings in the several States in which the legal concept is used. This situation (i.e. different meaning in different jurisdictions) is well reflected by the terms "lease" or "trust", which may variably be used in more than one State among Anglo-Saxons jurisdictions. Direct use of a foreign legal concept may be found under the EC tax directives, which define the subjective scope of their application, by reference to a list of entities drawn up on a Member State-by-Member State basis.[23]

Another approach is the *use of tax definitions under internal tax law* so that foreign concepts that are similar but not identical to the internal law legal concept – which expression is used in the statute – may equally be covered. For instance, the definition may make reference to the legal or economic effects or characteristics of the legal concept, so that if the foreign concept fits into the

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[19] This issue is dealt with extensively in Chapter 10, at 10.4.3.

[20] These are reorganizations such as mergers that are effected pursuant to the laws of the United States, a State or Territory, or the District of Columbia.

[21] J. Ulmer, "Treaty Issues in Cross-border Effects of Restructuring including Change of Legal Form" in *Cross border effects of restructuring Including Change of Legal Form*, G. Maisto, ed., The Hague–London_Boston: Kluwer Law International, 2001, at 23–24. See also T.L. Evans, "Respecting Foreign Mergers under US tax law", in *Tax Notes International*, 2000, at 393.

[22] See also, Chapter 12, at 12.4.2.

[23] In the field of EU tax law, this solution is found in the Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, the Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States and in the Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States. These directives contain annexes listing the entities that shall benefit from the tax regime granted by the directives.

definition, the provision will apply.[24] Hence, the law may describe, for example, what the main features of a "security" are that make it either a bond or a share, in order to apply the tax provisions relating to either interest or dividends.

A variation in this approach is to adopt *statutory rules on the characterization of foreign concepts*. This technique has found application in the characterization of foreign entities for tax purposes.

Lastly, internal law might simply *disregard the issue*, in which case only interpretation criteria could govern and resolve the issue of interpretation.

In the event provisions exist under internal law that govern a similar domestic legal concept, the interpreter may question whether the application of these provisions to the foreign (similar) concept is permitted through analogy (i.e. relevance of the legal concept and application of analogy or direct application). In some States, for instance, some scholars argue that provisions containing tax obligations may not be applied to similar cases by analogy.

Quite surprisingly, neither the OECD Model Convention nor the Commentaries pay any particular attention to authentic languages nor provide guidance on linguistic discrepancies among texts having equal authority. It is intended that this book provides useful material and insightful comments – and possible solutions – to the problems of multilingual texts and the interpretation of tax treaties and EC tax law.

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[24] See, Ruling No. 0845-98 issued on 20 May 1998 by the Spanish Ministry of Finance, in which the Spanish Ministry of Finance granted tax neutrality to Spanish shareholders of two merging US companies, relying on the internal Spanish tax law definition of "merger", which departs from the company law definition. This ruling is discussed in *Cross-border Effects of Restructuring, including Change of Legal Form*, G. Maisto, ed., The Hague–London–Boston: Kluwer Law International, 2001, at 23–24.